

***Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554***

In the Matter of)	
)	
Rules and Policies Concerning)	MB Docket No. 04-256
Attribution of Joint Sales Agreements)	
In Local Television Markets)	

To: The Commission

COMMENTS OF NEXSTAR BROADCASTING, INC.

Submitted by

Howard M. Liberman
Elizabeth A. Hammond
DRINKER BIDDLE & REATH LLP
1500 K Street, NW
Suite 1100
Washington, D.C. 20005
(202) 842-8800

Attorneys for
Nexstar Broadcasting, Inc.

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SUMMARY

Nexstar Broadcasting, Inc. (“Nexstar”) is the licensee of 26 television stations in 25 markets. In a number of these markets Nexstar has entered into joint sales agreements with another in-market broadcaster. Accordingly, Nexstar is submitting these comments in order to address many of the issues raised in this Notice of Proposed Rulemaking as to whether the Commission should deem television joint sales agreements (“JSAs”) attributable interests. For the reasons set forth herein, the Commission should not make television JSAs attributable interests.

This proceeding is premature. Both the current local television ownership rule and the local television ownership rule adopted in the 2002 Biennial Review have been questioned by the courts. Consequently, the local television ownership landscape is sufficiently unclear without making additional changes. Nexstar urges that the Commission wait until the local television ownership rules are resolved before separately adopting a new rules policy that is really part of those rules.

Nexstar’s JSAs do not give it the right to control the policies, operations, management or any other matter relating to the stations for which it sells time under JSAs. Rather, these JSAs give the parties involved significant efficiencies of operation that are unavailable to the majority of medium and small market television broadcasters under the FCC’s local ownership rules (either as currently in effect or under the rule adopted in the Biennial Review). These efficiencies translate into savings that have allowed the parties involved to implement the DTV transition and expand local programming and community activities.

The Commission tentatively determined to make television JSAs attributable, primarily because it determined to do so with radio JSAs. In making this decision the Commission ignores the substantial differences between radio and television operations, including the significant

differences in the applicable ownership rules, the competitive differences between the radio and television industries and the substantial financial burden being imposed on television station owners under the DTV transition.

Television JSAs allow small market stations to generate some of the efficiencies of joint ownership, resulting in better service to the public and more local programming. At a time when the Commission is encouraging broadcasters to increase their commitment to local communities while mandating major expenditures related to the DTV transition, the Commission should not adopt a rule which will hinder broadcasters in these efforts. Therefore, Nexstar urges the Commission to retain its current policies on TV JSAs.

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Nexstar Broadcasting, Inc. (“Nexstar”), by its attorneys, respectfully submits its comments in response to the Commission’s *Notice of Proposed Rulemaking* (“NPRM”) in the above-captioned proceeding, which asks whether television joint sales agreements (“JSAs”) should be deemed attributable interests. As a party to several JSAs, Nexstar is in a position to address many of the issues and questions the Commission raises in this NPRM.

As an initial matter, Nexstar believes this proceeding is premature and that the issue of television JSA attribution should be deferred until the Commission completes its obligations with respect to local television ownership under the 2002 Biennial Review.¹ Further, Nexstar respectfully disagrees with the Commission’s tentative conclusion that television JSAs should be attributable. Television JSAs are inherently different from radio JSAs and, therefore, should not be treated as identical for attribution purposes. Moreover, television JSAs provide small market stations with efficiencies that allow them to provide stronger public interest benefits to their communities such as: (i) implementing the DTV transition; (ii) expanding local news offerings; (iii) purchasing new technology, such as satellite trucks and weather radar, which directly

¹ *In the Matter of 2002 Biennial Regulatory Review*, 18 FCC Rcd 13620 (2003) (“*Biennial Review*”), *affirmed in part, remanded in part, Prometheus Radio Project v. F.C.C.*, 373 F.3d 372 (3rd Cir. 2004) (“*Prometheus*”).

benefits the local community; and (iv) participating at a higher level in local community activities. Nexstar firmly believes that attribution of television JSAs will indelibly impair the DTV transition and will reduce or eliminate many of the public interest benefits that local communities receive as a result of these agreements.

I. BACKGROUND.

Nexstar owns and operates twenty-six TV stations in twenty-five Designated Market Areas (“DMAs”). All of Nexstar’s stations are in DMAs 52 and below.² In ten of its markets, Nexstar has entered into JSAs with another broadcaster, Mission Broadcasting, Inc. (“Mission”).³ In another market, Nexstar has entered into an outsourcing agreement that includes a JSA component with a subsidiary of Sinclair Broadcast Group. Nexstar and the other parties to these agreements have entered into these relationships because the local TV ownership rules prevent them from deriving the efficiencies associated with owning and operating more than one station in these markets.⁴

Nexstar’s JSAs permit both parties to achieve significant efficiencies of operation which are essential to providing better service to their communities. For example, the savings generated through the JSAs have allowed some of the involved stations to purchase advanced

² Nexstar’s station WHAG-TV, Hagerstown, Maryland, is technically in the Washington, DC market, DMA 8, but actually serves the Hagerstown “sub-market” within this DMA. In 1998 the Commission recognized that this station does not provide service to the Washington, D.C. metropolitan area and has categorized the station as a “remaining market station” for regulatory fee purposes.

³ Nexstar and Mission have entered into JSAs in Wichita Falls, Amarillo, Abilene, San Angelo and Lubbock, Texas; Springfield, Missouri; Terre Haute, Indiana; Scranton, Pennsylvania; Joplin, Missouri; and Utica, New York. Nexstar and Mission also are parties to shared services agreements (“SSAs”) in these markets. Effective November 1, 2004, Nexstar and Mission will become parties to a JSA and an SSA in Rockford, Illinois, where Mission is in the process of acquiring a station and Nexstar already owns one. Nexstar and Mission are also parties to option agreements which, if exercised, would permit Nexstar to acquire the Mission stations should the Commission’s rules permit such ownership.

⁴ See Section 73.3555(b) of the Commission’s rules.

weather radar systems (which cost in excess of \$500,000) in order to bring the most accurate weather information to the local community – a huge benefit to viewers of Nexstar’s and Mission’s stations in Texas and the midwest where weather can turn severe suddenly. These agreements also have allowed the parties to initiate or expand local news on stations in markets where, for the most part, it is uneconomical to broadcast local news or as large a quantity of local news. In addition, several of the non-Nexstar-owned stations broadcast other local programming that the stations otherwise could not afford to produce, such as *Sunday Live with Jim McNulty* in Wilkes Barre-Scranton, *Missouri Southern University Football Coaches Show* in Joplin, and live local church services in Wichita Falls. Further, the savings accrued under these agreements have allowed the stations to expand their participation in community events, such as broadcasts of parades, sponsorship of political debates, and support for charities such as the Children’s Miracle Network Telethon, March of Dimes, the Leukemia Light the Night Project, Race for the Cure, Toys for Tots, Habitat for Humanity, Meals on Wheels and Amber Alerts. If the Commission deems television JSAs attributable, funding for many of these public interest activities will be reduced or disappear.

II. THE COMMISSION SHOULD DEFER ACTION IN THIS PROCEEDING UNTIL ITS 2002 BIENNIAL REVIEW IS FINAL.

The Commission’s initiation of this proceeding is premature. In 2003, the Commission revised its local television multiple ownership rule to allow the common ownership of two television stations in markets with 17 or fewer television stations, provided that a single entity may not acquire an attributable interest in more than one station ranked among the top-four stations in the market based on audience share.⁵ Nexstar and other parties have petitioned for

⁵ *Biennial Review*, 18 FCC Rcd at p. 13668.

reconsideration of this decision with respect to the prohibition of ownership of two top-four stations. In addition, the Court of Appeals for the Third Circuit stayed the implementation of this revised TV ownership rule and issued a decision remanding significant portions of the *Biennial Review* order to the Commission for further justification. Specifically, the Third Circuit remanded the local television ownership rule for the Commission to demonstrate that the numerical limits it established are justified.⁶ However, the Commission has not yet addressed the pending petitions for reconsideration or acted upon the Court's remand. Therefore, the television ownership landscape is unclear. Until the Commission finalizes its local television ownership rules, establishing the circumstances under which licensee can own more than one station in a market, a determination on television JSA attribution is letting the tail wag the dog. Accordingly, the Commission should delay action in this proceeding until such time as its local television ownership rules are final.

III. STANDARD TERMS OF NEXSTAR'S AGREEMENTS WITH MISSION.

If the Commission determines to continue with this rulemaking proceeding despite the unsettled rules regarding local television station ownership, Nexstar hereby provides the Commission with some of the standard provisions from its JSAs with Mission:⁷

Term: The initial term of each JSA is ten years and, unless otherwise terminated by either party, may be extended for an additional ten-year term. Either party may terminate the JSA at the end of the initial ten-year term by six months prior written notice to the other.

Advertising Time: Mission sells to Nexstar, and permits Nexstar to resell to advertisers, all of the time available for commercial announcements on the applicable Mission station. However, Nexstar must comply with certain guidelines and all applicable laws

⁶ *Prometheus*, 373 F.3d 372, 418-420.

⁷ The standard JSA, SSA and Option Agreement between Nexstar and Mission, which the Media Bureau has reviewed, are on file with the Commission in connection with Mission's application for consent to acquire WUTR, Utica, New York (File No. BALCT-20031222ACA).

and regulations for such advertising. Further, Mission may, in its sole discretion, decline to accept advertising sold by Nexstar in the event that it reasonably believes that the broadcast of such advertising would violate applicable laws or regulations, would damage Mission's reputation in the community, or would otherwise be contrary to the public interest. Mission also may preempt any of the commercial time sold by Nexstar in order to present program material of pressing public interest or concern.

Advertising Rates: The rates for advertising sold by Nexstar are set by Nexstar, subject to all applicable statutes and regulations regarding access to airtime and rates charged for political advertising. However, at the request of an advertiser, Mission may set a reasonable rate and sell time to such advertiser on behalf of Nexstar.

Compensation: Nexstar collects the advertising revenues pursuant to the JSAs and pays 70 percent of such revenues over to Mission. In exchange for the services Nexstar provides under the JSA, Nexstar retains 30 percent of the revenues it collects as its fee.

The JSAs do not create a partnership, agency relationship or joint venture between the parties and, except as otherwise specifically provided in the JSA, neither is authorized to act as an agent of or otherwise to represent the other party.

Nexstar provides no programming to Mission's stations pursuant to the JSAs. However, under separate shared service agreements ("SSAs") between the parties, Nexstar may produce news programming for the Mission stations so long as such newscasts do not comprise more than 15 percent of the programming broadcast during any broadcast day. Mission personnel determine the title and format of newscasts provided under the SSAs, and the newscasts appear as if they had been originated by Mission. Nexstar is not otherwise involved with any other programming for the Mission stations. The SSAs require Nexstar and Mission to maintain separate managerial and other personnel to carry out the selection and procurement of programming for their stations.

Other general terms of the Nexstar/Mission SSAs include:

Term: The initial term of each SSA is for ten years and, unless otherwise terminated by either party, may be extended for an additional ten-year term. Either party may terminate the SSA at the end of the initial ten-year term by six months prior written notice to the other.

Sharing Arrangements: The parties may agree to share the costs of certain services and procurements which they individually require in connection with the operation of their stations, such as joint or cooperative buying arrangements, or the performance of certain functions relating to the operation of one station by employees of the operator of the other station (subject in all events to the supervision and control of personnel of the operator of the Station to which such functions relate). The parties generally also are sharing building space, wherein one party leases space from the other.

Management Personnel: Each station employs its own personnel performing the typical functions of a general manager and a business manager. These individuals report solely to their employer's management.

Compensation: Mission pays Nexstar a flat monthly fee for the services Nexstar provides, which varies by market.

The SSAs also are not intended to create a partnership, joint venture, or agency relationship between the parties and do not give either party any right to control the policies, operations, management or any other matter relating to the station operated by the other party.

The terms of Nexstar's outsourcing agreement with Sinclair are similar but not identical to Nexstar's JSAs and SSAs with Mission, with the most significant difference related to compensation. Under this agreement Nexstar provides the Sinclair station with services including sale of advertising time, performance of administrative functions not related to programming, consultation on news and public affairs programming, monitoring and repair of equipment, and consultation with respect to the negotiation of carriage rights. For these services, Nexstar receives 50 to 65 percent of the stations' combined monthly operating profits and Sinclair receives 35 to 50 percent of the stations' combined monthly operating profits. (The percentage of broadcast cash flow is determined based on the yearly broadcast cash flow achievements of the stations.) Nexstar also pays Sinclair for certain of Sinclair's expenses. This agreement will expire on December 1, 2008, unless earlier terminated by the parties pursuant to its terms.

Finally, Nexstar notes that it does not have a financial investment in either Sinclair or Mission. However, Nexstar guarantees Mission's debt under Mission's credit agreement.

Likewise, Mission guarantees Nexstar's debt under Nexstar's credit agreement as well as Nexstar's public debt.

IV. THE ATTRIBUTION OF RADIO JSAs SHOULD HAVE NO BEARING ON THE ISSUE OF ATTRIBUTION OF TELEVISION JSAs.

The Commission states that it has “no reason to believe that the terms and conditions of TV JSAs differ substantially from those of radio JSAs, and . . . we tentatively conclude that . . . [they] should be treated similarly.”⁸ However, the Commission makes this rush to judgment without consideration of the differences between local radio and television ownership rules, without consideration of the differences between the industries, and without consideration of the differences between radio and television JSAs. Specifically, the Commission does not consider the following substantial and significant differences:

Under the Commission's local radio rules, one owner can own at a minimum at least half of the radio stations in even the smallest of radio markets and up to eight stations in the largest of markets.⁹ Further, the radio ownership rules place no restrictions on whether the multiple ownership involves the top stations in a market, the bottom stations in a market or any combination thereof. Consequently, the Commission's radio ownership rules already provide radio station owners with the ability to create significant scale of ownership. As the Commission noted in the *Biennial Review*, “in any given radio market, a broker may own or may have an ownership interest in stations, operate stations pursuant to an LMA, or sell advertising time for stations pursuant to a JSA.”¹⁰ This is not true for local television ownership. In a majority of the

⁸ *NPRM* at ¶ 2.

⁹ 47 C.F.R. §73.3555(a).

¹⁰ *Biennial Review*, 18 FCC Rcd at p. 13744.

television markets an owner may own only one television station. Only in the largest markets may one owner own two television stations; and, even then, at least one of the stations must be ranked below the top-four ranked stations in the market at the time of acquisition.¹¹ Therefore, under the Commission's current rules, a television station owner will never be able to control the amount of advertising inventory that a radio broadcast station owner can, and an in-market television JSA is much less likely to convey the level of market power associated with radio JSAs.¹² Nexstar also notes that, unlike radio transactions, there have been very few petitions filed against parties who have submitted plans to enter into television JSAs as part of an acquisition. Therefore, Nexstar believes it is reasonable to infer that except in limited, specific instances, television JSAs are not harming and generally will not harm competition in a market.

The NPRM does not account for the in-market competitive differences among radio and television broadcasters. Radio owners continue to compete predominantly against other in-market radio owners for advertising sales and do not compete against satellite radio, which does not sell local advertising. In contrast, television station owners compete against other in-market television station owners and cable television for their share of the local television advertising dollars. Cable interconnects are providing significant competition to local television stations in most markets.¹³ In Nexstar's experience, a cable interconnect in a market will obtain advertising revenues equivalent to those of a Fox station's revenues.

¹¹ Although the Commission has adopted rules that allow triopolies in the largest markets and duopolies in some smaller markets, these rules are not yet and may never be effective. Moreover, the prohibition on common ownership of two top-four stations has been retained.

¹² If the Commission's adopted but stayed *Biennial Review* local television ownership rules become effective, attributing television JSAs in those markets where one owner can own multiple stations may be appropriate. However, until such time as the Commission's adopted rules are effective, such attribution is premature.

¹³ A cable interconnect provides advertisers with the ability to purchase local ads on all (or nearly all) cable systems in a market through a single sales representative.

In addition, in deciding to attribute radio JSAs, the Commission expressed its concern with competition in the radio marketplace because the JSA broker sells advertising packages for the group of stations the owner owns as well as those it has JSAs with.¹⁴ In all but two of its markets, Nexstar has separate sales personnel assigned to its station and the other in-market station for which it sells time; and Nexstar does not require advertisers to purchase time on both stations in order to advertise on only one station.

Radio JSAs and television JSAs have different terms and the Commission's expressed concern that JSAs can provide "influence or control such that the [brokers] have a realistic potential to affect the programming decisions of licensees or other core operating functions" is not applicable to Nexstar's television JSAs.¹⁵ In determining to make radio JSAs attributable, the Commission stated that "licensees of stations subject to JSAs typically receive a monthly fee regardless of the advertising sales or audience share of the station [and, therefore], licensees . . . have less incentive to maintain or attain significant competitive standing in the market."¹⁶ Although Nexstar has not examined the terms and conditions of the radio JSAs that led to the Commission's determination, Nexstar accepts the Commission's finding that radio JSAs typically involve payment of flat monthly fees to brokered stations. However, the payment terms for the Nexstar/Mission JSAs are substantially different, with Mission receiving seventy percent of the monthly revenues collected under the JSA (and not a fixed monthly fee). This provides ample incentive for Mission to obtain and schedule quality programming and otherwise meet its

¹⁴ *Biennial Review*, 18 FCC Rcd at p. 13744.

¹⁵ *NPRM* at ¶ 3.

¹⁶ *Biennial Review*, 18 FCC Rcd at pp. 13744-45.

viewer interests and needs, thereby increasing audience share and revenues for its station.¹⁷ And, as stated in Section III, *supra*, Nexstar and Sinclair split their combined station revenues under their agreement. Thus, both stations have substantial incentive to increase their competitive standing in the community.

Under these facts, the Commission's tentative conclusion to treat television JSAs as attributable simply because it determined to do so with radio JSAs is flawed. The Commission should make an independent determination regarding television JSAs.

V. SIGNIFICANT PUBLIC INTEREST BENEFITS DERIVE FROM TELEVISION JSAs.

Nexstar's JSAs with Mission and Sinclair provide significant public interest benefits through the provision of more local programming. For example, in almost every DMA where Nexstar has a JSA/SSA arrangement in effect, the stations involved have achieved operating efficiencies which have allowed the parties to invest in additional, vibrant, high-quality news programming, generally allowing both stations to provide a greater number of newscasts. In addition, the JSAs have generated savings in certain markets that have allowed Nexstar to purchase satellite uplink trucks or doppler weather radar equipment so that both stations to can provide greater service to the local community. Mission also has used savings generated under the JSAs to expand local programming on its stations. Further, the stations are able to be more active community citizens, participating in parades, local charitable events and public service activities. Television JSAs are allowing small market broadcasters to generate some of the efficiencies of joint ownership to better serve viewers and retain talented, creative employees. At a time when the Commission is seeking to encourage localism (and has an open rulemaking

¹⁷ The purchase price terms under the option agreements between Nexstar and Mission are based on multiples of cash flow. This also provides incentive for Mission to maximize revenues and increase cash flow.

proceeding on the subject), the Commission should not take action that will negatively affect a station's ability to provide its community with increased local programming.

In addition, the television industry is facing a substantial challenge with respect to the digital transition. The Commission has mandated that all television stations must be broadcasting full-power digital signals by either July 1, 2005 or July 1, 2006 (subject to certain exceptions). Nexstar estimates that the cost of conversion to full-power digital operations is \$800,000-\$1,000,000 per station – and this expense is in addition to the approximately \$250,000 to \$300,000 Nexstar's stations have already invested in the digital conversion. Television JSAs allow stations to operate more efficiently, thereby increasing the cash flow available to help television stations with the cost of the digital conversion. In smaller markets, such as Abilene, Texas or Utica, New York, where the conversion to full-power digital operations will require fifteen to twenty percent of the market's advertising revenues, the efficiencies and savings generated through JSAs will help stations accumulate the funding required for full-power digital conversion while maintaining the stations' ability to broadcast quality programming and hire qualified employees.

VI. ADOPTION OF ATTRIBUTION RULES FOR TELEVISION JSAs.

As Nexstar has established herein, attribution of television JSAs is unnecessary and will harm the public interest. Nonetheless, if the Commission determines to adopt an attribution standard for television JSAs, it should adopt only a brightline rule. A rule which adopts a case-by-case analysis will create too much uncertainty for both sellers and buyers of stations if a JSA is involved. Moreover, adopting a rule which mandates a case-by-case analysis would require parties who desire to enter into JSAs outside of an acquisition transaction to submit a petition for declaratory ruling, which, while pending, may have a negative impact on the local market and the parties involved.

If the Commission decides to make television JSAs attributable, Nexstar urges the Commission to provide either permanent grandfathering or an extended grandfather period for those broadcasters who entered into JSAs in good faith prior to July 13, 2004, the date upon which the Commission initiated this proceeding. If the Commission does not provide for permanent grandfathering, Nexstar urges that the Commission grandfather such JSAs until at least one year after the date on which all stations' analog broadcasting is terminated. This will allow broadcasters to continue providing public interest benefits to their stations' viewers while bearing the heavy expenses associated with the DTV transition. In addition, an extended grandfather period will allow the affected parties to make orderly transitions from their existing current arrangements to alternative business arrangements. Given the relative lack of complaints against television JSAs, an extended grandfather period will not unduly harm competition.

Furthermore, a determination to make JSAs attributable should have no impact on any station's renewal expectancy. With the current renewal cycle underway, a large number of stations will have their license renewals granted prior to any Commission decision in this proceeding. Therefore, any station involved in a JSA that files a renewal application after a decision in this proceeding whose renewal expectancy is diminished by such decision will be treated differently from a station involved in a JSA whose renewal was granted prior to such decision. The Commission cannot treat similarly situated applicants differently.¹⁸ Moreover, it would be fundamentally unfair to penalize broadcasters who have entered into agreements in good faith that do not violate the Commission's rules or policies for having done so.

¹⁸ See *Melodie Music, Inc. v. FCC*, 345 F.2d 730 (D.C. Cir 1965).

VII. CONCLUSION.

For the foregoing reasons, Nexstar respectfully urges the Commission to retain its current policy of not considering television JSAs to be non-attributable interests. If the Commission does change its policy in this regard, the Commission should permanently grandfather existing JSAs or provide for grandfathering at least until after the conclusion of the DTV transition.

Respectfully submitted,

NEXSTAR BROADCASTING, INC.

By: /s/ Howard M. Liberman
Howard M. Liberman
Elizabeth A. Hammond
DRINKER BIDDLE & REATH LLP
1500 K Street, NW
Suite 1100
Washington, D.C. 20005
(202) 842-8800

Its Attorneys

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